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**MEMORANDUM**

January 16, 2009

To: FiberTower Corporation  
From: John P. Janka   
James H. Barker  
Subject: Interpretation of 47 C.F.R. § 1.4000, FCC Preemption of  
Private and Governmental Restrictions on Fixed Wireless Antennas

The Federal Communications Commission's (FCC) rule, Section 1.4000 of Title 47 of the Code of Federal Regulations, preempts restrictions that impair the use of small antennas (one meter or less in diameter) that receive and/or transmit various types of broadcast, satellite, and fixed wireless signals. This rule expressly prohibits private restrictions, such as lease provisions and homeowners' association rules. Furthermore, this law takes precedence over state and local regulations.

**A. Restrictions That Impair The Use Or Installation Of Small Antennas That Receive Or Transmit Data, Telecommunications, Or Video Are Not Permitted**

1. FiberTower Corporation (FT) and its customers have the right to install antennas one meter or less in diameter that receive or transmit fixed wireless signals. Antennas for all types of service, whether voice, data, or video, are covered. These antennas may be installed in any area under the exclusive control of the user (either FT or its customer), whether owned or leased and whether the premises are residential or commercial.

2. Governments and municipalities cannot impair installation and use of qualifying antennas by requiring zoning variances, building permits, or construction permits, whether prior to or after installation. Landlords or homeowners' associations cannot use lease provisions, covenants, or other forms of private agreement to impair the installation and use of these antennas. While it may be permissible to require reasonable prior notice before installing an antenna, such a provision cannot be used, directly or indirectly, to suggest prior approval is needed.

**B. Procedural Requirements For Parties Seeking To Impose Restrictions**

1. A private or governmental party that desires to restrict the installation of these antennas can do so only if it can demonstrate to the FCC or a court that it has good reason to have such a restriction. The restriction is unenforceable until the FCC or a court has made a finding that the proposed private restriction or local regulation should be allowed.

2. A party may not undertake any civil, criminal, administrative, or other legal action to enforce the restriction unless the party has first obtained a ruling from the FCC or a court of competent jurisdiction. No attorneys' fees may be collected and no fines may be assessed or may accrue while the proceeding is pending.

3. Restrictions can not impair the use or installation of antennas by unreasonably delaying or increasing the cost of installation or use, or precluding reception of an acceptable signal.

- The FCC may determine that a restriction is reasonable if it has a clearly defined health or safety objective that is stated in the text of the regulation itself or otherwise readily available to the user, and is applied non-discriminatorily to comparable devices. Restrictions may be reasonable if necessary to preserve a historic or prehistoric site listed in the National Register of Historic Places. In both safety and preservation cases the restrictions must be no more burdensome than necessary and must be applied in a non-discriminatory manner.
- General safety language, or vague or unreasonable safety concerns, will not justify a restriction.
- Aesthetic regulation of antennas by a local zoning authority or homeowners' association generally is not permitted, such as regulation through height limits, requirements to move visible antennas, limits on multiple antennas, or requiring prior approval of an architectural committee.
  - ✓ The small FT antennas contemplated for installation generally are 10", 12" or 24" in both width and height, or smaller. This is dramatically smaller than the satellite antenna systems already installed nationwide without restriction (see attachment).

4. The burden to prove a restriction reasonable falls on the party seeking to enforce the restriction, not on the installer or user.

5. If the ruling is adverse to the user, the user has a 21-day grace period to comply.

6. Parties seeking to enforce restrictions which would normally be prohibited may petition for a waiver, which may be granted on showing of local concerns of a highly specialized or unusual nature, such as preservation of a historic district.

ATTACHMENT

